BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH THOMPSON	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 228,558 & 234,470
OVERLAND PARK MANOR	)	
Respondent	)	
Self Insured	)	

ORDER

The respondent requested review of the Award dated April 21, 2000, entered by Administrative Law Judge Julie A. N. Sample. The Board heard oral argument on October 4, 2000.

APPEARANCES

Claimant appeared by her attorney, Michael J. Joshi of Kansas City, Missouri. Respondent appeared by its attorney, Kip A. Kubin of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This appeal involves two docketed claims for two separate accidents which were consolidated for trial and award. Respondent's Application for Review describes the issues as:

> 1. All findings and decisions contained in said Final Award including, but not limited to:
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> a. Whether the Court properly determined that Claimant had a work disability after these accidents;
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> b. Whether Claimant discharged her burden of proof to show what Claimant's average weekly wage was;

c. Whether the Court erred in finding that Claimant had a new accident on January 22, 1998 as opposed to her treatment simply being a continuation from her prior accidents;

d. Whether the Claimant discharged her burden of proof to show that Claimant's restrictions are as a result of Claimant's accident.

During oral argument to the Board, however, the parties agreed that average weekly wage was no longer an issue. The Board, therefore, adopts the findings and conclusions of the Administrative Law Judge (ALJ) as to the claimant's average weekly wage in both docketed claims.

In Docket No. 228,558 the ALJ awarded permanent partial disability compensation based upon claimant's permanent impairment of function. Claimant stopped working after the second accident, which is Docket No. 234,470 and, therefore, had an actual wage loss of 100 percent. However, Judge Sample found claimant did not make a good faith effort to find appropriate employment post accident and a wage was imputed. Nevertheless, because claimant's post accident wage earning ability was less than 90 percent of her average weekly wage, the ALJ awarded permanent partial disability compensation based upon a work disability. Judge Sample arrived at a 60.5 percent permanent partial disability in Docket No. 234,470 by averaging a 73 percent task loss with a 48 percent wage loss.

Claimant testified that both accidents were witnessed by a supervisor. This testimony is uncontroverted. Respondent admits the first accident but denies the second, arguing that any aggravation was a natural consequence of claimant's preexisting condition. Furthermore, it is respondent's position that claimant did not sustain permanent injury from either accident. In the alternative, respondent contends that a work disability should be denied and claimant's benefits should be limited to her percentage of permanent functional impairment because she allegedly quit her job with respondent voluntarily. Respondent agrees with the ALJ's finding that the claimant did not make a good faith effort to obtain employment after she left her job with respondent, but also argues that but for her non-work related health problems, claimant retains the ability to do her former job and, therefore, its comparable wage should be imputed.

In addition, during oral argument and in its brief to the Board, respondent renewed its timely objections to the admissibility of certain expert medical testimony and exhibits, in particular, the records from the functional capacities evaluation (FCE) ordered by Dr. William O. Reed, Jr.

Conversely, claimant contends that the ALJ's findings as to the percentage of functional impairment should be increased in both docketed claims and that the wage loss should be 100 percent in Docket No. 234,470, but that the Award entered by the ALJ should otherwise be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked for many years as a certified nurse's aide (CNA). However, following an injury while working at a different nursing home, claimant went to work for respondent in May 1997 as a certified medication aide (CMA) , but also did some CNA duties. On June 10, 1997, claimant was sitting with her charge nurse at the nurse's station when the chair slid out from under her. She struck her neck and back against a cabinet and landed on the floor, injuring her neck, arm and back.

Claimant was treated by Dr. Bono who sent her to physical therapy. She was off work for a short period of time before being released to light duty. Eventually, all restrictions were lifted and she returned to her regular job duties. Her second accident occurred on January 22, 1998. She and the charge nurse on duty were helping a patient up from his bed when she experienced a dramatic increase in her neck, shoulder and back symptoms. She reported this accident and was sent back to Dr. Bono. She was then referred to Dr. Gaddy who ordered an MRI. Thereafter, she was referred to orthopedic surgeon, William O. Reed, Jr., M.D. When claimant attempted to return to work with respondent, she was told by the director of nursing that she would not be hired back because she was too injury prone.

Because claimant suffered "unscheduled" injuries, the permanent partial general disability for each is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. Neither the presumption nor the wage earning ability test are in the current statute,[3] but in reconciling the principles of Foulk to the new statute, the Court of Appeals in Copeland held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[4]

After her second accident claimant attempted to return to work with respondent, but was refused. Because claimant could not perform her regular job with respondent, was not offered an accommodated job, was terminated, and thereafter did not refuse an offer of other accommodated work from respondent, Foulk is not implicated. The Kansas Court of Appeals' holdings in Oliver[5] and Bohanan,[6] not Foulk or Lowmaster,[7] govern the facts of this case and support claimant's right to a work disability award based upon respondent's inability to supply her with comparable post-injury wage employment tailored to prevent her from aggravating or worsening her physical condition.

The Kansas Court of Appeals has stated that in order to avoid a work disability claim, employers must extend an offer of work post-injury that pays comparable wages and

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 396, 944 P.2d 179 (1997).

[3] *See* Gadberry v. R. L. Polk & Co., 25 Kan. App. 2d 800, 802, 975 P.2d 807 (1998).

[4] Copeland at 320.

[5] Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

[6] Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[7] Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

the work must truly reside within the claimant's restrictions and physical limitations.[8] Failure to provide work residing within the claimant's restrictions entitles claimants to seek alternate employment without sacrificing a work disability claim. In the case of Oliver, which clarified Lowmaster, respondent had clear notice concerning the claimant's continuing physical difficulties. In this case, despite the absence of restrictions from a physician at that time, respondent made the decision not to retain claimant. This decision was no doubt due, at least in part, to lingering doubts about claimant's physical ability to perform her job duties without sustaining additional injury. Claimant also had doubts about her ability to do her former job duties. These doubts were later supported by the restrictions recommended by P. Brent Koprivica, M.D., and Deborah Ruggles, M.D.

Despite her restrictions and limitations, claimant has failed to establish that she has met her burden of good faith under Copeland. But there are at least three reasons why the Kansas Court of Appeals' decision in Copeland does not support the respondent's argument for wholesale denial of claimant's work disability claim. First, claimant did not refuse an offer of employment from respondent. Second, despite her release by Dr. Reed, claimant was not physically able to perform all of the tasks she had performed in her job with respondent. Third, Copeland does not demand a denial of all work disability claims where there is a finding that claimant, after not returning to her pre-injury employment, did not thereafter engage in a "good faith effort" to find comparable wage employment. Rather, Copeland dictates that a wage will be "imputed" to the claimant using the information available in the record including expert testimony, where appropriate. In this case, claimant attempted only one job after her last injury. She worked for a few days doing home healthcare but was not physically able to perform that job. In applying Guerrero to the facts in this case, it was reasonable for claimant to leave a job which was causing her symptoms to worsen. Having justifiably left the post-accident job with home healthcare, however, her post-injury wages should still not be based upon her actual earnings, or a 100 percent loss. Instead, under Copeland a wage should be imputed using the available facts and testimony because claimant thereafter failed to make a good faith effort to find appropriate employment. Claimant testified that she looked for work, but admitted she had only applied for one job since being terminated by respondent.

The Award of the ALJ determined that claimant failed to make a good faith effort to find appropriate employment. The Board agrees. The ALJ then imputed the federal minimum wage to claimant for the wage loss prong of the work disability test. The Board agrees with this as well. There is little evidence concerning claimant's transferable job skills or what her present ability is to earn wages. Claimant's 15 year work history is all in the area of patient care. She can no longer perform those duties and even the more limited duties she performed doing home healthcare made her symptoms worse. Accordingly, she has few transferrable skills. The Board finds claimant does not retain the

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[8] *See* Bohanan and Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

ability to earn wages post injury that would equal 90 percent of her pre-injury average weekly wage. Therefore, a work disability award is appropriate.

The record contains the testimony of two physicians, Dr. Reed and Dr. Koprivica, and also the court-ordered independent medical examination report of Dr. Ruggles, who saw claimant on March 1, 1999. In this instance, Judge Sample found Dr. Reed's testimony less credible and, accordingly, afforded it less weight than that of Dr. Koprivica and Dr. Ruggles. She adopted the functional impairment ratings given by Dr. Ruggles for both accidents, and adopted Dr. Koprivica's task loss opinion for the second accident. The Board agrees. The Board likewise agrees that claimant has met her burden of proving a 48 percent wage loss and a 73 percent task loss which combine for a 60.5 percent work disability in Docket No. 234,470.

Respondent had authorized Dr. Reed to examine and treat claimant, and had requested that Dr. Reed provide a permanent partial impairment rating.[9] Respondent objected to claimant's cross-examination of Dr. Reed about the FCE report. Respondent also objected to claimant offering that report into evidence as Claimant's Exhibit 1 to the transcript of Dr. Reed's March 9, 2000 deposition. In response to questions from respondent's counsel, Dr. Reed acknowledged that as a part of his examination he ordered "some additional diagnostic tests", including a functional capacity evaluation, a bone scan and an MRI scan.[10] Upon cross-examination by claimant's counsel, Dr. Reed again acknowledged that he sent claimant for a functional capacities evaluation, that he considered the FCE report in forming his opinions and that he considered the report to be a part of his office chart.

> Q. Now, Doctor, it's a common practice of yours, is it not, to send people out for these functional capacities evaluations?
> A. It's one of the diagnostic tests I frequently put patients through, yes.
> Q. And you rely on it, do you not?
> A. It's one of the main diagnostic tests I rely upon and use as aids in establishing a diagnosis and treatment plan in evaluation of a patient, yes.
> Q. Do you have any reason to dispute the findings of this particular evaluator as it relates to Deborah Thompson?
> A. No, I don't dispute the findings. Like I said, it's one part of many diagnostic studies I take into account in the evaluation and treatment of my patients.
> Q. And what are the others?

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[9] March 9, 2000 Depo. of William O. Reed, Jr., M.D., at 5.

[10] March 9, 2000 Depo. of William O. Reed, Jr., M.D., at 5.

A. My interview, my physical examination, a radiographic test, bone scan, MRI, CT scan if necessary, myelogram, a whole host of tests that we may subject patients to that have specific complaints.
Q. Do you keep this functional capacities evaluation as part of your record, Doctor?
A. Yes, I do.
MR. JOSHI: I'd offer Exhibit #1.
MR. KUBIN: I object. It's hearsay and it's also barred under the terms of 519.[11]

Respondent's objections to Dr. Reed's testimony about the FCE report and to the introduction of the report are overruled. First, the evaluator who prepared the FCE report is not a "health care provider" as contemplated by K.S.A. 44-519.[12] A health care provider is defined as "any person licensed, by the proper licensing authority of this state, another state or the District of Columbia, to practice medicine and surgery, osteopathy, chiropractic, dentistry, optometry, podiatry, audiology or psychology."[13] Second, K.S.A. 44-519 does not apply to Dr. Reed's testimony. "The statute literally applies only when a party seeks to introduce a report or certificate of a physician or surgeon into evidence."[14]

As the Court stated in Boeing v. Enloe, "K.S.A. 44-519 does not limit the information a testifying physician or surgeon may consider in rendering his or her opinion as to the condition of an injured employee."[15] Moreover, Dr. Reed laid more than a sufficient foundation for the admission of the FCE report which contained the results of a diagnostic test that he ordered, that he relied upon in forming his opinions and that he considered to be a part of his chart.

After reviewing the record, considering the briefs and hearing the parties' arguments, the Board finds that the ALJ's Award should be affirmed and adopts the findings and conclusions of the ALJ as its own.

AWARD

WHEREFORE, the Board finds the Award dated April 21, 2000, entered by Administrative Law Judge Julie A. N. Sample, should be, and is hereby, affirmed.

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[11] March 9, 2000 Depo. of William O. Reed, Jr., M.D., at 25-26.

[12] *See* Roberts v. J.C. Penney Co., 263 Kan. 270, 949 P.2d 613 (1997) and Boeing Military Airplane Co. v. Enloe, 13 Kan. App. 2d 128, 764 P.2d 462, *rev. denied* 244 Kan. 736 (1988).

[13] K.S.A. 44-508(i).

[14] Boeing at 130.

[15] Boeing at Syl. ¶ 2.

IT IS SO ORDERED.

Dated this ____ day of June 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

Our only disagreement with the majority's decision is the admissibility of the FCE report. We agree that the report may be considered by a health care provider in formulating an opinion. But the document is not admissible pursuant to the spirit of K.S.A. 44-519. Further, the FCE report contains hearsay and it was improper to admit the report without the author laying a foundation or claimant establishing an exception to the hearsay rule.

BOARD MEMBER

BOARD MEMBER

c: Michael J. Joshi, Kansas City, MO
Kip A. Kubin, Overland Park, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director